five instances instruments were drawn, and in four the claims were against attorneys. Sixty-nine miscellaneous cases included personal injuries, claims under the Workman's Compensation Act, bastardy and criminal cases, and naturalization and civil service problems. Sixteen cases have been tried in court by members of the Bureau. Of these, six were before the Superior Court, four before the Probate Court, and six before the District or Municipal Courts. Fifteen trials were won by the Bureau, and one was settled to avoid defeat. $4,268.13 has either been actually recovered or the payment of it decreed with bonds, in behalf of clients.

COLLECTION OF BRIEFS IN THE LAW LIBRARY. — On page 775 of this issue of the REVIEW may be found a list of briefs submitted in the Ames Competition during the year 1912–1913. The list referred to in the April issue of this volume was erroneously described as consisting of briefs submitted during the year 1912–1913. It should have been 1911–1912. This list is being published for the first time.

THE EFFECT OF FILING A LIMITATION OF LIABILITY CLAUSE WITH THE INTERSTATE COMMERCE COMMISSION.— The Supreme Court recently decided (Justice Pitney delivering a dissenting opinion) that, if a railroad has filed with the Interstate Commerce Commission a regulation that its liability on checked baggage will be limited to one hundred dollars unless a greater value is declared by the shipper and excess charges paid, a shipper, though ignorant of the existence of the regulation, who checks baggage without declaring any value can only recover the limited amount. *Boston & Maine Railroad* v. *Hooker*,[1] 34 Sup. Ct. 526.

By the settled rule of the federal courts,— now the only rule applicable to contracts for interstate shipments, because of the Carmack Amendment [2] as expounded in the *Croninger* case,[3] — the normal shipment is with liability for the entire actual value of the goods.[4] On theory, carriage with limited liability is an exceptional service which exists only when the shipper by shipping on a certain agreed or represented valuation has estopped himself to assert a greater worth.[5] This proposition has been recently re-affirmed by the Supreme Court.[6] The

[1] For review of decision in State court see 25 HARV. L. REV. 186.

[2] 34 U. S. STAT. 595.

[3] Adams Express Co. *v.* Croninger, 226 U. S. 491, 33 Sup. Ct. 148. For review of this case see 26 HARV. L. REV. 456.

[4] Railroad Co. *v.* Fraloff, 100 U. S. 24; The Majestic, 166 U. S. 375.

[5] Hart *v.* Penn. R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151; Graves *v.* Adams Express Co., 176 Mass. 280, 57 N. E. 462; Oppenheimer *v.* U. S. Express Co., 69 Ill. 62; Magnin *v.* Dinsmore, 56 N. Y. 168, 62 N. Y. 35; Earnest *v.* Express Co., 1 Wood (U. S.) 573; Matter of Released Rates, 13 I. C. C. R. 550.

[6] "The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel." Neiman-Marcus Co. *v.* Wells Fargo & Co., 227 U. S. 469, 476, 33 Sup. Ct. 267, 269. "It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the

court in the principal case admits the necessity of a valuation by the shipper, but the majority hold that the shipment without declaring the value is a valuation and that thus an estoppel is created. They argue that because the carrier has filed a regulation with the Interstate Commerce Commission as to how the agreed value shall be reached, the shipper is affected with constructive notice of the regulation, and that therefore where he fails to declare a greater value he can be said to have agreed or represented that the goods are worth only one hundred dollars. And further, if this regulation as to manner of valuation is unreasonable, the court holds that it cannot be declared invalid in a collateral proceeding, but must be directly attacked before the Interstate Commerce Commission.[7]

This seems a startling result. It is true that the *Hefly* and the *Mugg* cases decided that if a shipper requests and receives a certain service he is bound thereby to pay the rate scheduled for that service, regardless of his knowledge of the rate or of any inconsistent contract made by the carrier with him.[8] It is usually said that the shipper "has notice" of the appropriate rate by reason of its being on file with the Commission. As a matter of fact, the shipper in such a case has no notice of any kind, but in order to insure that every shipper receiving the same service shall pay the same rate, and so prevent discrimination, the law binds each to pay the legal rate, regardless of notice or lack of notice.[9] Taking literally this misleading phrase "presumed to have notice," it may seem logical to say if a shipper has notice of a rate by the filing of it, he also has notice of a grade of service, a limitation clause, or what might be called an offer for a valuation agreement, provided that is filed. Looking, however, at the substance of the situation, there is easily seen to be a great difference between the case where the shipper asks for a certain service and the instant case. Only in cases where a shipper is found to have received a certain service has it been held that the binding nature of the schedule need be invoked.[10] The issue in the principal case is what kind of a service did the shipper receive. Since legally the only type of service is one with unlimited liability unless an affirmative agreement or statement of valuation is made by the shipper, he cannot be said to have requested [11] or in fact to be entitled to the

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purpose of obtaining the lower of two or more rates or charges proportioned to the amount of the risk." Adams Express Co. *v.* Croninger, 226 U. S. 491, 509, 33 Sup. Ct. 148, 153. See also expression to the same effect in Missouri, Kansas & Texas Ry. Co. *v.* Harriman, 227 U. S. 657, 671, 33 Sup. Ct. 397, 400.

[7] T. & P. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350; United States *v.* M. C. Rd. Co., 122 Fed. 544, 546; Clement *v.* L. & N. R. Co., 153 Fed. 979.

[8] Gulf, Colorado, etc. Ry. *v.* Hefly, 158 U. S. 98, 15 Sup. Ct. 802; Texas & Pacific Ry. *v.* Mugg, 202 U. S. 242, 26 Sup. Ct. 628.

[9] Chicago & Alton R. Co. *v.* Kirby, 225 U. S. 155, 32 Sup. Ct. 648.

[10] As in the Hefly and the Mugg cases, *supra*, Note 8.

[11] "There can be no limitation of liability without the assent of the shipper." Cau *v.* Texas & Pacific Railway Co., 194 U. S. 427, 431, 24 Sup. Ct. 663, 664. "If any implication is to be indulged in from the delivery of the goods under the general notice it is as strong that the owner intended to insist on his rights and the duties of the carrier as it is that he assented to their qualification." New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 382. Railroad Co. *v.* Fraloff, *supra*; The Majestic, *supra*.

limited service without the creation through constructive notice of a fictitious affirmative act on his part. Such a result is a wholly unnecessary, radical and unjust extension of the doctrine. If followed out logically, it would allow railroads to make use of a strategically advantageous position to overreach their patrons. For instance, they might discard their present lengthy bills of lading, issue simple receipts, and still bind the shipper without his knowledge by the mere filing of regulations with the Commission.

As to the rule that a filed schedule can only be attacked before the Commission it is submitted that there is no necessity of attacking the regulation at all. It is an attempt to effect a result which is in the nature of things impossible, that is, to enable one party to make a bilateral valuation agreement without the assent of the other party. The result is that the agreement as to valuation has not been made and therefore the common-law service is the basis of the shipment. To adjust the discrepancy between the service rendered and the rate paid, the railroad must collect the proper excess charges and thus avoid a discriminatory result.

DYING DECLARATIONS AS EVIDENCE IN CIVIL SUITS. — The Kansas Supreme Court has recently held that the dying declaration of a deceased person may be used in a civil case to prove any fact to which the declarant would be permitted to testify if living. *Thurston* v. *Fritz*, 138 Pac. 625. In so doing, it frankly overrules its own former decisions [1] and abandons the universally established doctrine that such declarations are admissible only on the issue of the guilt of some person charged with the homicide of the declarant.[2] The argument is that if such evidence is admitted to hang a man, there should be no hesitation in its use to sustain the taking of property.

It may be admitted that, in its present form, the dying declarations exception to the hearsay rule is anomalous. But whether the departure from principle consists in admitting the evidence in homicide cases or in confining it to that class is a question upon which writers disagree.[3] Professor Wigmore's opinion, adopted by the Kansas court, is that dying declarations were generally recognized as admissible for all purposes until about 1800, at which time the courts blundered into the present rule. It is submitted that the facts do not support this view.

While the hearsay rule was still taking shape, we find the declarations of dying men referred to as especially trustworthy,[4] but the precise extent to which they could be admitted seems to have remained in doubt long after the hearsay rule itself had crystallized. At least there was originally no settled practice under the hearsay rule of admitting

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[1] State *v.* Bohan, 15 Kan. 407; State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

[2] Waldele *v.* New York Central & H. R. R. Co., 19 Hun (N. Y.), 69. See 1 GREENLEAF, EVIDENCE, § 156, 2 WIGMORE, EVIDENCE, §§ 1432 ff.

[3] See Professor Wigmore's able argument in favor of the rule adopted by the Kansas court. 2 WIGMORE, EVIDENCE, §§ 1430 ff. Also Mr. Chamberlayne's contention that the dying declaration exception is "discredited." 4 CHAMBERLAYNE, EVIDENCE, §§ 2819, 2859 ff.

[4] See 2 WIGMORE, EVIDENCE, § 1430, n. 1.